United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1965

United States Court of Appeals

FOR THE SECOND CIRCUIT

MODERN HOME INSTITUTE, INC., and
ROMAC RESOURCES, INC.,

Plaintiffs-Appellants,

—against—

HARTFORD ACCIDENT AND INDEMNITY COMPANY, HARTFORD FIRE INSURANCE CO., THE AETNA CASUALTY AND SURETY CO., THE TRAVELERS INSURANCE COMPANY, THE TRAVELERS INDEMNITY CO., and THE CONNECTICUT ASSOCIATION OF INDEPENDENT INSURANCE AGENTS, INC.,

Defendants-Appellees.

BRIEF OF APPELLEES HARTFORD ACCIDENT AND INDEMNITY COMPANY AND HARTFORD FIRE INSURANCE COMPANY

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This is an action under Section 1 of the Sherman Act for treble damages charging the defendants-appellees with an alleged group boycott of plaintiffs-appellants.

The District Court (Blumenfeld, J.), holding that defendants had made a conclusive showing that no reasonable man could agree with plaintiffs' theories and that plaintiffs had failed to come forward with any evidence to support their theories, granted summary judgment in favor of all defendants.

Issue Presented

Was the District Court correct in holding that defendants were entitled to summary judgment where, after seven years of discovery, plaintiffs failed to adduce evidence in support of their allegations of conspiracy and defendants presented substantial and uncontradicted evidence negating those allegations?

Statement of the Case

The original complaint in this action was filed on April 15, 1966 on behalf of Romac Resources, Inc. ("Romac") as plaintiff (No. 11386). Named as defendants were Hartford Accident and Indemnity Company and Hartford Fire Insurance Company ("The Hartford"), The Aetna Casualty and Surety Co. ("Aetna"), The Travelers Insurance Company and The Travelers Indemnity Co. ("Travelers"), Allstate Insurance Company, Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company, Liberty Mutual Insurance Company and Liberty Mutual Fire Insurance Company, State Farm Mutual Insurance Company and State Farm Fire and Casualty Company, and The Connecticut Association of Independent Insurance Agents, Inc. ("CAIA").

The complaint alleged that Romac had developed a method of compiling, through telephone interviews, lists of names of automobile insurance policyholders, by geographical area, along with the dates of expiration of their respective policies (known as "expiration dates" or "X dates"), that plaintiff had been in the business of selling such lists of expiration dates, and that the defendants, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1,

had formed a single combination and conspiracy consisting of "an agreement and concert of action" to

> "(a) Eliminate and suppress competition among themselves through an unlawful boycott of the Plaintiff.
>
> "(b) Insulate themselves from the competition, envisaged and anticipated as a consequence of the free and unimpeded sale by Plaintiff of said lists of names and 'X dates.'
>
> "(c) Restrain the Plaintiff from marketing, selling and otherwise dealing in such lists of names and 'X dates' or profitably circulating them in any manner which would increase competition among the Defendants generally and to suppress and prevent any trade or commerce in such lists of names and 'X dates' in the State of Connecticut or elsewhere in the United States."

The answers of The Hartford and each of the other defendants denied all allegations of unlawful conduct.[1] Discovery began with depositions on June 1, 1966, and continued through 1972. A total of 19 individuals have been deposed, 15 of whom are present or former employees of one or the other of the defendants, including R. Channing Barlow and John F. Gilmore, officers of The Hartford. The deposition transcripts total almost 5000 pages and the exhibits to the depositions number in the hundreds.

Plaintiffs directed interrogatories to the defendants on September 6, 1967, December 12, 1970 and November 12,

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[1] An identical complaint on behalf of Modern Home Institute, Inc. ("Modern Home"), the parent company of Romac, was filed on June 8, 1966 (No. 11464). The actions were consolidated by order entered June 29, 1966.

1971, all of which were answered in full detail. The Hartford has produced for inspection by plaintiffs' counsel hundreds of documents from its files, and has fully complied with every request for documents, formal or informal. To the best of our knowledge the same is true with respect to the other defendants.

In November of 1971, over five and one-half years after this action was originally filed, plaintiffs moved for leave to file an "Amended Substituted Consolidated Complaint," which was granted, over defendants' opposition, on December 29, 1971. The new complaint not only repeated the basic allegations of the original complaint—adding the charge that the defendant insurance companies had "engaged in a course of deliberately interdependent consciously parallel action in refusing to deal with plaintiff" (App. II, p. 9aa) —but also asserted for the first time five new counts alleging various "sub-conspiracies" among certain of the defendants and others.

Count Two of the substituted consolidated complaint charged that the three defendant companies which do business through independent agents ("agency" companies)— The Hartford, Aetna and Travelers—had conspired with CAIA, other agents' associations and agents throughout the country "in writing, in practice and/or by custom of industry to restrict and restrain competition in the sale and ownership of lists of names and 'X dates'," in that the CAIA had pressured the agency companies not to do business with plaintiffs and these companies "responded to said pressure and agreed among themselves expressly and impliedly not to purchase 'X dates' from the plaintiff." Counts Three, Four and Five repeated this charge against The Hartford, Aetna and Travelers, respectively, and Count Six charged a separate conspiracy among three defendant companies which do not do business through independent agents ("di-

rect writer" companies)—Allstate, Liberty Mutual and State Farm.

By March 1972 all defendants had answered the new complaint, and on March 24, 1972 a stipulation providing a schedule for the completion of discovery was entered into by all parties and approved by Judge Timbers at a pre-trial conference. At this conference plaintiffs filed a two page memorandum wherein they stated:

> "Plaintiffs' basic allegation is that it was foreclosed from marketing these expiration dates as a result of the concerted action of the defendants as more particularly appears in the new complaint. Plaintiff would expect to prove that each of the companies (sic) decision not to purchase plaintiffs' product was not a unilateral one but rather an interdependent one. It would show that the boycott was a result of a deliberate campaign of pressure and response to pressure on the part of the defendants." (App. III, p. 215AA.)

On September 28, 1972, a second pre-trial conference was held, at which time plaintiffs advised the Court that they had agreed to dismiss the action as against the so-called "direct writer" companies, because the conspiracy theory on which they intended to proceed to trial did not involve these companies, but only the companies dealing with independent agents.[2] In their Pre-Trial Memorandum for the September 1972 conference, plaintiffs set forth a list of 20 potential trial witnesses. All 20 have been fully deposed, with the single exception of J. Kenneth Cagney, a former employee of The Hartford whose name has been known to

[2] Stipulations of dismissal were subsequently filed in 1973 as to the Nationwide, Liberty and State Farm companies and in 1974 as to Allstate.

plaintiffs at least since 1962. (*See* deposition of Robert E. D'Arpa, App. I, p. 66a-67a)

After notification by all parties that discovery was complete, the remaining defendants promptly filed motions for summary judgment. Oral argument on the motions took place before Judge Clarie on June 25, 1972.

On July 13, 1972, a conference was held in Judge Clarie's chambers wherein he informed counsel for all parties that in the mid to late 1950's he had represented insureds of Travelers in some automobile negligence cases. The Judge stated that if any party wished him to recuse himself on this basis he would do so. Counsel for plaintiffs asked that this be done and it was agreed that the case would be reassigned to another judge. Counsel for all parties, including counsel for plaintiffs, agreed that no further oral argument would be necessary unless requested by the new judge. (Hearing of July 13, 1973, Tr. at 7, 19)

The action was thereafter reassigned to Judge Blumenfeld and all counsel were notified, by letter dated July 26, 1973, that Judge Blumenfeld had been advised that counsel were agreeable to his deciding the pending motions for summary judgment without further oral argument. No objection was entered to this notification. Judge Blumenfeld entered an order granting summary judgment in favor of all defendants on June 18, 1974.

Plaintiffs filed a notice of appeal on July 2, 1974.

Statement of Facts

In the 1950's plaintiff Modern Home had been engaged in the business of compiling "family profiles". This consisted of telephoning new residents in an area to

> "find out where they were living at the present time, when they were moving, how many children they had, if they had an automobile, and many other things about the family." (D'Arpa, App. I, p. 7a)

The information thus gathered would be put into list form and "sold to retail merchants in general". (D'Arpa, App. I, p. 8a) The sales price was ten cents per name. (D'Arpa, App. I, p. 33a) As an outgrowth of that business, Modern Home had experimented with the sale of different items of information, such as whether a family was in the market for a certain kind of product, to particular kinds of producers or sellers. (D'Arpa, App. I, pp. 7a-8a, 11a)

In January 1961, at the request of a Nationwide Insurance Company agent, Modern Home's experimental operation in Cleveland began soliciting automobile insurance expiration dates (D'Arpa, App. I, pp. 25a-27a), and during the months of January through April 1961 compiled lists containing such information on about 3,000 persons. (D'Arpa, App. I, p. 31a) These were sold on a non-exclusive trial basis to various insurance agents in the Cleveland area, 100 names at a time. (D'Arpa, App. I, p. 32a) No expiration date lists were sold after April 1961, when the Cleveland operation was abandoned. (D'Arpa, App. I, p. 24a)

At the beginning of May 1962, Robert D'Arpa, of Romac, who was then attempting to interest insurance companies in purchasing lists of expiration dates, contacted Frank Cox of The Hartford, who referred D'Arpa to Channing Barlow. On May 3, 1962 D'Arpa phoned Barlow, briefly described the proposal of Romac to sell expiration date lists to The Hartford and requested a meeting for the following week.

On May 8, 1962 at 2:00 P.M., in a meeting at The Hartford's offices, D'Arpa outlined his proposal to Barlow and his associates John Gilmore and Kenneth Cagney. The basic proposal was that Romac would compile lists of automobile insurance policyholders with their addresses and the dates of expiration of their respective policies. These lists would be sold to two insurance companies, one an agency company and the other a direct writer. (*See* Opinion of 6/18/74, App. II, p. 26aa and n. 1) The lists were to be broken down by geographic areas and would be compiled from telephone interviews, as had been done in the Cleveland experiment. (D'Arpa, App. I, pp. 72a-78a)

Channing Barlow's first and primary concern regarding the proposal made to The Hartford was about its quality—could certain depressed areas be eliminated, could D'Arpa actually put together a viable organization and could the names of the issuers of the policies be supplied? (Barlow, App. I, p. 338a; D'Arpa, App. I, pp. 72a-74a) At the end of their meeting Barlow told D'Arpa that, while he personally was interested, the proposal would require a considerable amount of thought and investigation. (Barlow, App. I, p. 339a; D'Arpa, App. I, p. 74a) On May 9, 1962, Max Wallach, President of Romac and Modern Home, wrote to Barlow repeating the substance of the proposal. (App. II, p. 65aa)

Immediately after (and even during) the presentation by Mr. D'Arpa on May 8, 1962 serious problems were seen by Barlow and his colleagues. (Barlow, App. I, p. 339a; Gilmore, App. I, pp. 319a-320a) One problem was that Romac was not prepared to supply the name of the insurer along with the name of the policyholder, and thus The Hartford, had it purchased the lists, would have been buying the names of its own policyholders. Unless a great deal more work was done on the lists sorting out these

duplications before the lists were sent out to the agents, some of those persons solicited would be existing Hartford policyholders. (Gilmore, App. I, p. 319a; Barlow, App. I, pp. 339a-341a)

Another problem was the high cost of the Romac proposal. On purely a test basis the names were to cost $.30 each, and thereafter the price was to go up to $.45 per name. (App. II, p. 65aa) By comparison, The Hartford had been paying The Reuben H. Donnelley Corporation about two cents per name for lists of names and addresses by geographic area. (Barlow, App. I, p. 331a)

The greatest difficulty was that without not only the name of the policyholder's existing insurer but also his agent, if any, The Hartford could not use the information without causing serious problems in its relations with agents. (Gilmore, App. I, p. 320a) The Hartford does not sell insurance directly, as do the "direct writer" insurance companies, but sells through independent agents. The independent agents with whom The Hartford deals are not its employees and many, if not most, of them deal with other insurers as well. There is nothing in their agreements with The Hartford which obligates them to place insurance with The Hartford exclusively. (Gilmore, App. I, p. 321a) In cities where The Hartford had more than one agent, it would have found itself supplying one agent with information about the customers of another agent, thus incurring the displeasure of at least one agent. (Gilmore, App. I, pp. 320a-321a)

All these problems were discussed among Messrs. Barlow, Gilmore and Cagney immediately after the meeting with D'Arpa on May 8, 1962. Because of the agency relations problems Gilmore immediately advised against utilizing the proposal. (Gilmore, App. I, pp. 319a-320a) Despite

these negative impressions, the proposal was discussed with other officers at The Hartford, and it was not until late May 1962 that a decision was reached not to purchase the lists of names from Romac. (App. II, pp. 66aa-67aa)

At the same time, Barlow realized the difficulties that The Hartford would have in making use of the Romac proposal might not be experienced by other insurance companies. It was virtually certain that no agency relations problems would be experienced by a "direct writer" company which operates through a captive, employee sales force. In view of this Barlow and his colleagues thought that The Hartford's agents should be alerted to the substance of the Romac proposal. (Barlow, App. I, pp. 354a-355a)

At a staff meeting on May 21, 1962, the decisions were made not to buy the Romac proposal and to send a bulletin to all Hartford agents. (App. II, p. 66aa) On May 31, 1962, Channing Barlow wrote Max Wallach of Romac and informed him that The Hartford had decided not to purchase the lists of names. (App. II, p. 68aa) The final draft of the letter to agents was prepared and released on June 6, 1962, but at least some of the letters did not actually leave The Hartford's mail room until several days later. (App. II, pp. 69aa-71aa)

Reaction to this letter was immediate and, in many instances, heated. Agents started phoning Mr. Barlow on June 12 and the volume was such that the next day a log began to be kept of the incoming phone calls on this subject. (App. II, pp. 67aa, 79aa) On June 13, 1962 the replies and comments began to come to Mr. Barlow by mail. (*E.g.*, App. II, pp. 77aa, 78aa) Because of the volume of inquiries and the repeated suggestion by those inquiring that plaintiffs must have been obtaining their lists by illegal or unethical

means, Mr. Barlow sent a memorandum, dated June 14, 1962, to all Business Development Department Liaison Representatives, who were also receiving inquiries, explaining why The Hartford had taken the position that it had and that plaintiffs gathered their information through telephone interviews. (App. II, p. 75aa) Inquiries continued and on June 18, 1962 a second letter was mailed to all Hartford agents explaining that plaintiffs' lists were compiled by telephone interviews, and not obtained from confidential sources. (App. II, p. 76aa)

The first time anyone at The Hartford had ever heard of plaintiffs or their proposed business was when D'Arpa telephoned Cox in early May 1962. At no time thereafter did any employee of The Hartford have any communication, direct or indirect, with respect to the plaintiffs with any employee of Aetna, Travelers or any other company with whom plaintiffs sought to do business. (Gilmore, App. I, pp. 323a-324a; Barlow, App. I, p. 358a)

Although The Hartford was entirely unaware of the fact, the evidence shows that Travelers had determined not to pursue plaintiffs' proposal on May 18, 1962, four days prior to The Hartford's reaching the same decision and three weeks before the sending of the June 6 letter to agents. (Coakley, App. I, pp. 432a, 439a-440a) The evidence also shows that Aetna did not reject plaintiffs' proposal until July 17, 1962, weeks after The Hartford had made its decision and communicated the decision in unequivocal terms to plaintiffs. (D'Arpa, App. I, p. 58a) The Hartford was as unaware of Aetna's dealings with plaintiffs as it was of Travelers'.

ARGUMENT

I.

The Grant of Summary Judgment Was Appropriate.

Rule 56 of the Federal Rules of Civil Procedure provides, in relevant part:

> "(c) . . . [Summary] judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .
>
> * * *
>
> "(e) . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Although a sharply divided Supreme Court cautioned that "summary procedures should be used sparingly in complex antitrust litigation" involving multifaceted business conduct over the course of many years, *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 (1962) (5-4 decision), the Court has made it equally clear that when the appropriate standards are met, as here, defendants are entitled to summary judgment.

The instant case is not complex nor did the conduct complained of extend beyond a period of a few weeks during

1962. Twelve years have passed since the events in question. Seven of these years have been devoted to discovery. Plaintiffs have deposed everyone they wished to depose and have had full access to all documents requested. There is no claim that additional discovery is needed. In this entire period of time plaintiffs have been unable to adduce any probative evidence in support of their claim of a conspiracy. Under these circumstances summary judgment was not only appropriate, but mandated.

Throughout their brief, plaintiffs claim that the District Court erred in allegedly failing to draw all inferences in plaintiffs' favor. This argument misconstrues the law and the actual holding of the District Court.

The court below recognized that the instant case was virtually in the same posture as *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, *rehearing denied*, 393 U.S. 901 (1968). There, the Supreme Court, affirming this Court's decision in *Waldron* v. *Cities Service Co.*, 361 F. 2d 671 (2d Cir. 1966), held that after nine years of discovery and a conclusive showing by defendant that the facts upon which plaintiff relied "to support his allegation were not susceptible of the interpretation which he sought to give them" then the burden of proof properly shifted to plaintiff to come forward with some evidence that a conspiracy actually existed. 391 U.S. at 289.

Mr. Justice Marshall, writing for the Court, continued:

> "To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance

> of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint." 391 U.S. at 289-90.

Accord, Chapman v. *Rudd Paint & Varnish Company*, 409 F.2d 635, 642-44 (9th Cir. 1969).

In the instant case the District Court recognized the lack of any "significant probative evidence" in support of appellants' allegations and held that to allow this case to go to a jury "would be to let speculation rule the case." Opinion of 6/18/74, App. II, p. 56aa. For this Court to reverse would be an endorsement of speculation by juries contrary to established law.

II.

The Hartford's Decision Not to Deal With Plaintiffs Was Unilateral, Independent and Lawful.

A. The Hartford's Decision Was Made Internally and Entirely Independently.

In the thousands of pages of deposition transcripts, the hundreds of deposition exhibits and other documents produced to plaintiffs' counsel and the extensive answers to interrogatories filed in this action there is not a shred of evidence which connects The Hartford with any of the other defendants—or anyone else for that matter—in combining, conspiring or agreeing not to purchase lists of expiration dates from the plaintiffs.

When The Hartford was first contacted in regard to the Romac proposal, Robert D'Arpa made it clear that the lists

had been or would be offered to numerous other insurance companies and that there was no assurance that The Hartford would be sold the lists even if it desired to purchase them. (D'Arpa, App. I, p. 73a) Immediately after the meeting on May 8, 1962, John Gilmore informed Channing Barlow that he was against The Hartford buying the lists of names. All personnel from The Hartford who attended the meeting and participated in subsequent discussions had strong reservations about the proposal. (Gilmore, App. I, p. 319a; Barlow, App. I, pp. 340a-341a)

At no time during the entire month of May 1962 was there any publicity about the Romac proposal. No discussions were held concerning the proposal between The Hartford and any other defendant or other insurance company. When, at the staff meeting of May 21, 1962, The Hartford concluded for its own legitimate business reasons that it would not purchase the lists, it was totally unaware of what, if any, action had been taken on the proposal by other insurance companies. This was still so when the decision not to purchase the lists was communicated to the plaintiffs by Mr. Barlow's letter of May 31, 1962. (Gilmore, App. I, pp. 323a-324a; Barlow, App. I, p. 358a) There is no evidence whatsoever to indicate that the decision was in any way contingent or dependent upon the decisions of other insurers not to do business with plaintiffs.

On the contrary, when The Hartford made its decision and then advised its agents of the proposal, Hartford personnel were fully convinced that the Romac proposal might be utilized by another insurance company and said as much in the bulletin of June 6, 1962. (App. II, pp. 66aa, 69aa) While this apparently turned out not to be the fact, the prior or subsequent decisions of other companies did not result from any kind of an "agreement" with The Hartford, which never had any communication with them on this subject.

B. There Is No Evidence To Support Plaintiffs' Contention That, In Determining Its Course of Action, The Hartford Consulted With CAIA.

In their Pre-Trial Memorandum of September 28, 1972, plaintiffs alleged that The Hartford deliberately delayed mailing the June 6, 1962 bulletin for "one week to ten days." The purpose of this delay, according to the plaintiffs, was to allow Channing Barlow, and other persons who are not named, time in which to contact

> "representatives of various state associations of independent agents including John Crosson [of CAIA] in order to generate publicity hostile to plaintiffs and to create an atmosphere of pressure which would cause the other agency writer companies to refuse to purchase the expiration dates." (Memorandum at p. 3)

The evidence in this case conclusively proves that there was no delay of that length in mailing the bulletin and that there were no communications with Crosson until after it had been mailed and received by a number of agents. Nevertheless, plaintiffs continue to assert, without citation to any evidence, that Crosson "had been in touch with the Hartford companies during the crucial time of preparation and of the sending of the June letter." (Brief at 28) This assertion is totally untrue.

The decision to send a bulletin to all Hartford agents had been made at the staff meeting on May 21, 1962. (App. II, p. 66aa) In the next week Channing Barlow prepared a draft of the bulletin and discussed it with several people at The Hartford. (Barlow, App. I, p. 353a) As evidenced by Mr. Barlow's memorandum to Mr. Gilmore, dated June 1, 1962, Barlow had intended that the bulletin be mailed prior to June 6, 1962. (App. II, p. 72aa)[3] The final draft of the

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[3] June 6, 1962 was a Wednesday. The memorandum of June 1 says that the bulletin "will probably [be] out into the field before your return on Wednesday . . ."

bulletin was dated June 6, 1962, but apparently it was not reproduced, addressed, stuffed and dispatched promptly, but "dribbled out" over the next few days. (App. II, pp. 70aa-71aa)

The Hartford's telephone log shows a telephone call from John Crosson on or after June 13, 1962 wherein he requested a copy of the bulletin. (App. II, p. 79aa) A separate notation dated June 14, 1962, which appears to be for the same call, also shows that Crosson had called and had been sent the agent bulletin and the June 14 memorandum to Liaison Representatives. (App. II, pp. 80aa, 75aa)

Both Barlow and Gilmore have testified that, prior to the time that the agents received the bulletins, there was no communication between The Hartford and anyone connected with CAIA (including Mr. Crosson). (Barlow, App. I, p. 358a; Gilmore, App. I, pp. 323a-324a) Crosson confirmed this in his testimony, stating that he first became aware of an attempt to market lists of expiration dates through a telephone conversation with a fellow agent *who had received* The Hartford bulletin. (Crosson, App. I, p. 370a) Crosson then called The Hartford and requested a copy of the bulletin and this constitutes the entire record of communication between The Hartford and anyone from CAIA. (App. II, pp. 79aa-80aa)

Realizing that they lack evidence to support their earlier contention that The Hartford deliberately delayed sending the June 6, 1962 letter in order to contact Mr. Crosson of CAIA, the plaintiffs now retreat from that position and add the assertion that Crosson had been in touch with The Hartford "certainly prior to the sending of the subsequent June 14 letters." (Brief at 28) While this is undeniably true it adds nothing to plaintiffs' case.

One of plaintiffs' allegations is that The Hartford instigated and continued a "campaign of pressure" designed to

insure that no other insurance companies would purchase the lists of X dates from plaintiffs. (Brief at 26-31) The June 14 memorandum from Barlow to the Hartford's Business Development Department Liaison Representatives (App. II, p. 75aa) and the June 18 letter from Barlow to all Hartford agents (App. II, p. 76aa) directly contradict plaintiffs' contention, and, again, they cite no evidence in support because none exists.[4]

Following receipt by The Hartford's agents of the June 6 letter, Barlow's office received numerous oral and written communications speculating that the persons offering the X date lists had gathered the information through the use of illegal or unethical means. (*E.g.*, App. II, pp. 73aa, 78aa) Both the memorandum of June 14 and the letter of June 18 were clearly designed to quiet such speculation. If The Hartford had truly been instituting a campaign of pressure, no such letters would ever have been sent. Any "campaign" would have been enhanced by the wide-spread belief that the X date lists were compiled illegally. Instead, The Hartford sought to quiet the speculation—thus proving that The Hartford never had any intent to put pressure on other insurance companies.[5]

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[4] The letter from Barlow, dated July 13, 1962, quoted in plaintiffs' Brief, at 30-30A, does not support this contention. In view of the record as a whole the calculated risk referred to therein is the risk that The Hartford's assumptions about its agents' reactions would prove incorrect. Plaintiffs failed to question Barlow about this letter at his deposition and lack any basis other than their own "belief" for attributing to it the distorted interpretation they advance.

[5] One remaining unanswered question, which shows the true weakness of plaintiffs' case, is why no direct writer insurance company ever purchased plaintiffs' lists. The campaign of pressure allegedly instigated by The Hartford and carried out by the independent agents and associations of independent agents, such as CAIA, could only have been effective in the context of an insurance company which utilized independent agents in the sale of

C. The Hartford's Rejection of Plaintiffs' Proposal Was Not Contrary to Its Self-Interest.

The uncontroverted facts demonstrate that The Hartford rejected plaintiffs' proposal because of the high cost of the lists both per individual name and in the aggregate, the fact that names of existing Hartford policyholders could not be removed without substantial additional effort and expense, and the unnecessary and undesired problems in The Hartford's relations with its agents that acceptance of the proposal would have created. *See, supra,* at 8-10. Any of these reasons alone would have been sufficient to cause The Hartford to reject the proposal and together they compelled such a result.

Plaintiffs' argument to the contrary is based solely on the proposition that it is easier to approach a person with regard to switching his automobile insurance coverage from one company to another at the time of the expiration of the old policy. The Hartford recognized this, yet concluded that the problems already mentioned outweighed any possible advantage which might result from the possession of plaintiffs' proposed lists.[6]

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insurance policies. Companies such as Nationwide, Allstate, Liberty Mutual and State Farm, originally defendants in this action but later dropped, are direct writers and utilize their own employees rather than independent agents to sell their insurance policies. A campaign of pressure by independent agents would have no effect on these companies yet they never purchased plaintiffs' lists.

[6] The Hartford's total sales promotion budget in 1962 was about $250,000, (Barlow, App. II, p. 332a), while plaintiffs' proposal was 9,000,000 names per year at an annual cost of over $4,000,000. Plaintiffs have suggested that "no doubt the price of the names . . . would have been adjusted . . ." (Brief at 55), but this is pure speculation. There is no evidence that there was any indication of willingness on the part of plaintiffs to negotiate a lower price, and no offer at a lower price was ever made.

The Opinion of the District Court also notes (App. II, pp. 48aa-55aa) that had The Hartford, or any of the other defendant insurance companies, actually reached agreement with plaintiffs for the purchase of the X dates there would have been a substantial risk that such an agreement would itself have violated the antitrust laws. While plaintiffs are correct in saying that this issue was not considered by The Hartford at the time (Brief at 55), such a statement cannot defeat the probability that, had The Hartford been seriously interested in plaintiffs' proposal, the antitrust implications would have had to have been thoroughly explored. The logic of the District Court is persuasive, and it is possible that the proposal would have been rejected on this alternative basis. The Hartford was never sufficiently interested in the proposal even to reach this problem.

D. The Hartford's Unilateral Decision Did Not Violate the Sherman Act.

For well over 50 years it has been established that Section 1 of the Sherman Act "does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal." *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919). *Accord, Theatre Enterprises, Inc.* v. *Paramount*, 346 U.S. 537, 540 (1954); *see United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960); *Ford Motor Company* v. *Webster's Auto Sales, Inc.*, 361 F. 2d 874 (1st Cir. 1966). *A fortiori*, as the District Court recognized, any commercial organization is free to determine what *products* it will, or will not, purchase.

The facts show conclusively that The Hartford's decision not to buy the lists of names from the plaintiffs was a wholly independent decision based on The Hartford's own business judgment, and, thus, plaintiffs' reliance on *United States* v.

General Motors Corp., 384 U.S. 127 (1966), is inappropriate. In that case the challenged action by General Motors took the form of "joint, collaborative action" with dealers and trade associations and, therefore, did not come within the scope of independent action permitted by *Colgate*. 384 U.S. at 140. Similarly *Ford Motor Company* v. *Webster's Auto Sales, Inc., supra*, upon which plaintiffs also rely, involved action by Ford at the behest of a dealer and action which took the form of an agreement with other dealers.

Plaintiffs have long suggested that the basic nature of The Hartford's relations with its agents somehow violate the Sherman Act in some respect somehow relevant to this case. In their Pre-Trial Memorandum of September 28, 1972, plaintiffs suggested that The Hartford's standard form agency contract violated the anti-trust laws because it allegedly placed "ownership" of expiration dates in the hands of the agents. This argument was totally spurious. All the contract does is state that, *as between The Hartford and the agent*, confidential information developed by the agent shall belong to the agent if business relations between The Hartford and the agent cease. On its face the contract quite clearly would not prohibit The Hartford or the agent from acquiring the same information from an independent source. In any case, the evidence in this case demonstrates that The Hartford's decision not to purchase the lists from the plaintiffs was in no way based on the agency contract.

That argument having failed, plaintiffs now advance the argument that it was a basic tenet of the industry that "the business of developing expiration dates would be left to individual agents." And further "that new entrants into the business of developing expiration dates would not be permitted." (Brief at 7) There is simply no evidence to support this allegation. The facts are exactly the contrary, as

appellants recognize later in their Brief when they state that

> "there was evidence that the companies themselves engaged in periodic promotions, designed to secure lists of potential customers and expiration dates." (Brief at 57)

In their Brief plaintiffs have gone to much trouble to patch together bits and pieces of deposition testimony in an attempt to show a custom and practice in the insurance industry which would not permit The Hartford to purchase the expiration date lists from the plaintiffs. There is simply no evidence which shows the existence of such a custom and practice—it is merely speculation on the part of plaintiffs.[7]

The most that the evidence can be said to show is that the independent agents probably would have been hostile toward any insurance company offering the expiration dates to the agents. The Hartford recognized this possibility and further recognized that it was entirely dependent upon the goodwill of its agents for continuance in the insurance business. Any action by The Hartford which displeases its agents could well have the effect, directly or indirectly, of causing those agents to place their insurance business with a company other than The Hartford. For

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[7] By arguing that an existing custom and practice in the insurance industry prevented The Hartford and the other defendant insurance companies from purchasing the expiration dates, plaintiffs in effect argue against their other allegation of a campaign of pressure designed to force the other companies into line. If the custom and practice existed in the form and with the force claimed by plaintiffs the "campaign of pressure" would have been totally unnecessary.

As noted by the District Court, the "campaign of pressure" argument itself cuts against the argument that the rejections were the result of the insurance companies "having agreed among themselves to act in concert." (Opinion of 6/18/74, App. II, p. 46aa n. 8)

The Hartford to remain a competitive force in the insurance industry it cannot ignore such realities.

There was the additional problem that the program, as offered by plaintiffs, contemplated purchase of the lists by The Hartford and resale to the agents.[8] Because The Hartford sells no insurance itself but only through independent agents, the expiration dates are of no value to The Hartford without this resale. The high price of the appellants' proposal and the expected hostility of the agents meant that very few, if any, agents would have purchased these lists. (See App. III, p. 170AAA, only 15% of agents in survey by Aetna willing to purchase the names at less than cost to company) The Hartford, therefore, could reasonably anticipate that, if it had agreed to purchase plaintiffs' lists (assuming plaintiffs had been willing to sell to The Hartford), it would have been bound to a program potentially costing $4,000,000 annually with no method of recovering its cost.

For these reasons, and the other reasons previously mentioned, The Hartford determined not to purchase the expiration dates. This determination was made without consultation with any other insurance company or any agent or agents' association. The mere fact that The Hartford, because it conducts all its business through independent agents, took account of what it believed would be the agents' reactions had the lists been purchased and offered to the agents does not controvert the fact that The Hartford's decision was made internally and independently.

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[8] This brings up the interesting question of why the plaintiffs never offered the expiration date lists directly to the agents or associations of agents. As noted earlier, it was the request of an agent for Nationwide which had originally caused plaintiffs to research this information, and, at least in the agency insurance context, the expiration dates were only of value in the hands of the agents.

Because The Hartford made its own independent business decision not to purchase the lists and did not act in concert with anyone else, The Hartford's actions did not violate the Sherman Act regardless of what effect these actions may have had upon plaintiffs' business. *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Theatre Enterprises, Inc.* v. *Paramount*, 346 U.S. 537 (1954); *Ricchetti* v. *Meister Brau, Inc.*, 431 F.2d 1211 (9th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); *Klein* v. *American Luggage Works, Inc.*, 323 F.2d 787 (3rd Cir. 1963).

Knowing that there is no evidence to support any conclusion other than that The Hartford made its own independent and unilateral decision, plaintiffs attempt to avoid this problem by pointing to the fact that the final decisions of the three defendent insurance companies were similar (*i.e.* they refused to purchase the lists) and waving the magic wand of "conscious parallelism." Again, there is *no evidence* to suggest that The Hartford was aware of the actions of the other defendants or that The Hartford's decision was dependent on the other defendants' rejection of plaintiffs' proposal. Failing such evidence, The Hartford's decision cannot be converted into conspiratorial conduct by the mere invocation of the term "conscious parallelism."

The Seventh Circuit, in *United States* v. *Standard Oil Company*, 316 F.2d 884 (1963), clearly stated that

> "[t]he substantive law of trade conspiracies requires some consciousness of commitment to a com-

> mon scheme. *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, [*supra*, at 540-41] . . . . Unless the individuals involved understood from something that was said or done that they were, in fact, committed to [a common scheme], there was no violation of the Sherman Act." 316 F.2d at 890.

Even if it could be shown that the defendants in the instant case were *mutually* conscious of one another's parallel behavior, of which there is no evidence, plaintiffs would be required to "demonstrate more than that the alleged co-conspirators engaged in a course of conduct, . . . , in which they would have engaged regardless of the others' conduct." *Dahl, Inc.* v. *Roy Cooper Co., Inc.*, 448 F.2d 17, 19 (9th Cir. 1971).

> "However ameliorative the doctrine [of conscious parallelism] may be, it has not dispensed with the requisite that conspiracy be proved. [citations] In the application of the doctrine the courts have recognized that certain parallel behavior is inherent in many business settings. Therefore, it has been held that proof of a conspiracy may not rest on similarity of conduct in the absence of evidence that the alleged wrongdoers were *mutually aware of such conduct and that the mutual awareness entered into their decisional processes.*" *Viking Theatre Corp.* v. *Paramount Film Distributing Corp.*, 320 F.2d 285 299 (3rd Cir. 1963), *aff'd by an equally divided Court*, 378 U.S. 123 (1964) (emphasis added).

Accord, Theatre Enterprises, Inc. v. *Paramount, supra; United States* v. *General Motors Corp.*, [1974-2] CCH Trade Cases ¶ 75,253 (E.D. Mich. 9/26/74), at p. 97,671 (even if shown to exist, "conscious parallelism does not violate the Sherman Act and is not proof of an agreement where the actions taken are reasonable responses to common business problems").

The facts of this case fit into no such mold of mutual commitment to a common scheme. When The Hartford declined to do business with plaintiffs, it was completely unaware of the intentions of any other insurer, and there is not a scintilla of evidence that its decision was in any way dependent upon the decision of any other insurer. If anything, the evidence shows that The Hartford fully expected that another insurance company would purchase plaintiffs' lists. The fact that no company ever did so is evidence of the defects of plaintiffs' proposal, not evidence of a violation of the law by The Hartford.

CONCLUSION

The simple fact of this non-complex case is that after twelve years, plaintiffs have nothing upon which to base their allegations other than pure speculation. The summary judgment provisions of the Federal Rules of Civil Procedure are expressly designed to prevent just such a case as this from wasting the time of court, jury and counsel and burdening litigants with unjustified expense. For this reason, and the reasons stated previously, the order of the court below, granting summary judgment in favor of Hartford Accident and Indemnity Company and Hartford Fire Insurance Company, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief of appellees Hartford Accident and Indemnity Company and Hartford Fire Insurance Company have been mailed, postage prepaid, to the following counsel of record pursuant to Rule 25, F.R. App. P.:

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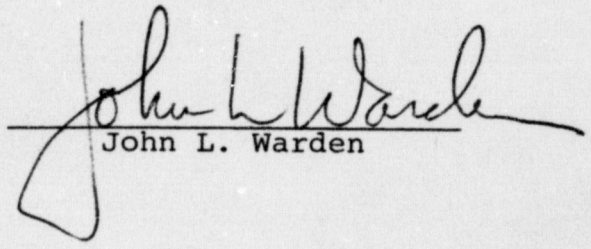

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